



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 190540

Pursuant to petition filed October 22, 2018, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Thursday, December 6, 2018 at 09:45 AM via telephone.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
████████████████████
████████████████████

█

ADMINISTRATIVE LAW JUDGE:

Nicole Bjork
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Arizona who received FS benefits in Milwaukee County from August 19, 2013 through November 10, 2018.
2. On January 8, 2018, a new FS card was issued to the respondent. On January 19, 2018, the respondent contacted the petitioner to report that he had no benefits on his card. The respondent was then informed

that the funds had been deposited on January 5, 2018 and subsequently used. The petitioner noted that a PIN number is required to use the FS card and that the PIN number for the respondent's FS card had not been changed, meaning that the person using the respondent's card knew the PIN number, information only known to the respondent.

3. On January 24, 2018, the respondent called the petitioner to report fraud. The petitioner arranged a meeting on June 29, 2018, after speaking with the respondent, to further discuss his fraud report and also his household composition.
4. The petitioner reviewed surveillance footage from stores where the respondent's FS card was used to purchase items. On January 6, 2018, surveillance was captured at [REDACTED] and it was determined that the respondent was not the person using his card. The petitioner then conducted an extensive review of the respondent's FS card usage over the prior 12 months and noted several questionable transactions, including numerous even dollar amount transactions and numerous back to back transactions, which according to the petitioner's experience with FS trafficking is indicative of FS trafficking. See Exhibits 3 and 4.
5. On September 17, 2018, the respondent reported that he was in Arizona. A new FS card was then sent to the respondent in Arizona on October 1, 2018, yet the card was never used in Arizona but continued to be used after that time in Wisconsin.
6. On October 18, 2018, the respondent contacted the petitioner and stated that he allowed others to use his card in the past and those individuals knew his PIN number. At that time, the petitioner notified the respondent that, during the course of the investigation, the individuals using his FS card were identified and interviewed. Based on those interviews, the petitioner determined that IPV's had occurred.
7. On June 19, 2018, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent allowed another person to use his FS card that did not reside in his home.
8. The respondent failed to appear for the scheduled December 6, 2018 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear. The respondent did call the administrative law judge several weeks after the hearing date and left a voicemail message stating that he had poor cell phone coverage in Arizona and missed the hearing. However, the respondent never called the administrative law judge with a phone number prior to the hearing date in order to reach him at the time of the hearing, which was required in the notice sent to him. Further, even if he had poor cell phone coverage, that excuse does not explain why he waited several weeks to contact the administrative law judge regarding missing his hearing.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all

the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

In this case, the overwhelming evidence establishes that the respondent has lived in Arizona for months, but his FS card was being used in Wisconsin. Further, the numerous even dollar amount transactions and back to back transactions, coupled with being used by other individuals, are a strong indication of FS trafficking. The respondent did allege that his FS card was stolen after all the benefits were used in January, 2018. However, the only way an individual could have possibly used his card would have been if the respondent gave that individual his PIN number. A random individual would not have been able to use the respondent's FS card without knowing the respondent's unique PIN number. Given the respondent's location out of state for part of the period in question, the surveillance footage showing other individuals using respondent's card and knowing his personal PIN number, along with the numerous even dollar transactions and back to back transactions, the evidence establishes a clear violation of FS rules and regulations along with an intent to do so.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that a participant cannot commit an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or Wisconsin statutes, for the purpose of using, transferring, or trafficking FoodShare benefits or QUEST cards.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

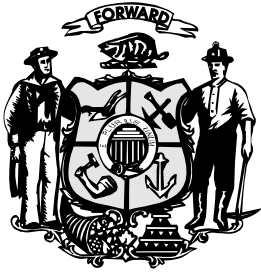
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 4th day of January, 2019

\sNicole Bjork
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 4, 2019.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]